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No. 84-950

In the Supreme Court of the United States

OCTOBER TERM, 1984

FREDDIE MYERS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

REX E. LEE
Solicitor General

STEPHEN S. TROTT
Assistant Attorney General

JOEL M. GERSHOWITZ
Attorney

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTION PRESENTED

Whether a drug conspiracy under 21 U.S.C. 846 may serve as a predicate offense for a charge of conducting a continuing criminal enterprise under 21 U.S.C. 848.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-69a) is reported at 745 F.2d 733.

JURISDICTION

The judgment of the court of appeals was entered on September 17, 1984. A petition for rehearing was denied on October 16, 1984 (Pet. App. 70a). The petition for a writ of certiorari was filed on December 13, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a five-week jury trial in the United States District Court for the Southern District of New York, petitioner was convicted of conspiring to distribute heroin and to possess heroin with intent to distribute it, in violation of 21 U.S.C. 846, and of conducting a continuing criminal

enterprise (CCE), in violation of 21 U.S.C. 848. He was sentenced to 40 years' imprisonment and fined $100,000 on the CCE count; the sentence on the conspiracy count was merged into the CCE count. In addition, the district court ordered the forfeiture of petitioner's profits from the enterprise, including his house. The court of appeals affirmed petitioner's conviction, but it reversed the forfeiture of his house (Pet. App. 1a-69a).

1. The evidence at trial is reviewed in detail in the opinion of the court of appeals (Pet. App. 5a-23a). In brief, it showed that petitioner headed an organization engaged in the large-scale distribution of heroin on a retail basis in the Harlem section of New York City. In the spring of 1982, the Drug Enforcement Administration (DEA) received information from a variety of sources that petitioner, who had previously been convicted of federal narcotics offenses, was involved in trafficking in substantial quantities of heroin. Based on that information, DEA agents conducted a surveillance of petitioner and several other persons suspected of participating in his organization. Pet. App. 5a. The agents observed petitioner's associates, his common-law wife, and one of her daughters participate in several apparent narcotics transactions (*id.* at 12a-14a). In addition, on January 14, 1983, agents observed petitioner engage in an apparent narcotics transaction at a Manhattan bar (*id.* at 17a-19a).

Beginning in early 1983, DEA agents, acting pursuant to a court order, conducted an electronic surveillance of the telephones in petitioner's home and his Manhattan office (Pet. App. 5a). The intercepted conversations included discussions between petitioner and his associates that apparently concerned narcotics transactions (*id.* at 14a-16a). One of the conversations connected petitioner to an apartment used as a heroin "mill" — *i.e.*, a place where heroin is diluted or "cut" for street-level distribution (*id.* at 8a-9a, 15a-16a). The behavior of petitioner and his associates, as well as their

intercepted statements, revealed that they were aware of the visual and electronic surveillance and were attempting to avoid it (*id.* at 16a-17a).

On March 6, 1983, agents executed a warrant to search petitioner's home, where they found $1,379,240 in cash, nearly $1.4 million worth of jewelry, 29 fur coats, two Mercedes Benz automobiles, two shotguns, and documents and photographs linking petitioner to various associates in the drug operation (Pet. App. 6a-7a). Simultaneous searches of the homes of petitioner's associates also revealed large amounts of cash and jewelry, as well as evidence connecting them to petitioner and to other participants in the drug venture (*id.* at 8a-11a). Neither petitioner nor his associates had any legitimate reported source of income that would explain their considerable wealth (*id.* at 20a-22a). Following the searches, petitioner and his associates were arrested and taken to a DEA office, where petitioner remarked, "[y]ou have my whole crew here. It looks like we are going to have a party here tonight" (*id.* at 7a).

2. Among other elements, the CCE statute requires that the defendant must have committed a federal drug felony and that this felony be part of a continuing series of drug violations. See 21 U.S.C. 848(b). As the court of appeals noted, and as petitioner agrees (Pet. 5 n.2), there is a "consensus of authority" (Pet. App. 24a) that the series element is satisifed by proof of three or more drug offenses.[1]

The indictment in this case charged petitioner in two counts. Count 1 alleged that petitioner conspired to distribute heroin and to possess heroin with intent to distribute it; listed as overt acts in this count were 15 telephone calls

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[1]As the language of Section 848(b) makes clear, only one of the series of violations must be a felony, and the remaining offenses may be misdemeanors under the federal drug law. In this case, all of the predicate offenses for petitioner's CCE conviction were in fact felonies.

made in order to facilitate the possession or distribution of heroin or the conspiracy to possess or distribute heroin (Pet. App. 26a). Count 2 alleged that petitioner had engaged in a continuing criminal enterprise in that, inter alia,

> he committed violations of Subchapter I of Chapter 13, Title 21, United States Code, including the violations alleged in count one of this Indictment, all of which count is incorporated by reference herein, as well as other violations of said statutes, all of which violations were part of a continuing series of violations of said statutes * * *.

Id. at 26a-27a. At trial, the government's proof of the series of violations showed, in addition to the conspiracy, two offenses involving the possession and the distribution of heroin arising out of a drug transaction in which petitioner personally participated, and seven offenses involving petitioner's use of the telephone to facilitate the commission of heroin felonies (*id.* at 27a).

At the request of petitioner's counsel, the district court instructed the jury that one of the offenses in the series of violations for CCE had to be the conspiracy under 21 U.S.C. 846 that was charged in Count 1 of the indictment. Thus, over the government's objection, the jury was instructed that it could not consider the CCE charge in Count 2 unless and until it found petitioner guilty of the conspiracy alleged in Count 1. The jury convicted petitioner on both the conspiracy and the CCE counts.

ARGUMENT

Petitioner contends that the drug conspiracy charged in this case cannot serve as a predicate offense for the CCE count. The court of appeals correctly rejected this contention in a thorough opinion upon which we rely, and further review is not warranted.

1. At the outset, it appears that petitioner did not preserve the issue in the district court, and therefore it is not properly presented in this Court. We are advised by the United States Attorney that petitioner did not — by pretrial motion, request for jury instructions, or otherwise — raise the question whether the conspiracy charged in Count 1 could be used as a CCE predicate. See Fed. R. Crim. P. 30. On the contrary, he affirmatively requested and received an instruction that the jury could not consider the CCE count unless it first convicted on the conspiracy count. He is accordingly entitled to reversal on appeal only if the instructions given constituted plain error and gave rise to a manifest injustice. See *United States* v. *Frady*, 456 U.S. 152 (1982). Especially since the government's evidence established a number of other offenses that sufficed to prove the requisite predicate offenses wholly without regard to the conspiracy, petitioner's failure to assert the issue in the district court, at a time when any prejudicial error could have been avoided by the court and the prosecutor, forecloses his belated effort to find grounds for reversal.

2. In any event, petitioner's argument is without merit.

a. Initially, it should be noted that the question presented in this case is one of statutory construction and does not implicate double jeopardy principles. Petitioner was prosecuted and convicted in a single proceeding, and thus no issue of successive prosecutions is involved. Likewise, because petitioner's sentence on the conspiracy count was merged into the CCE count, no issue of multiple punishments arises. Accordingly, as petitioner recognizes (Pet. 6, 11, 12 n.6), the sole issue here is the proper interpretation of the CCE statute.

b. This Court has repeatedly held that where " 'the statutory language is unambiguous, * * * "that language must ordinarily be regarded as conclusive." ' " *Russello* v.

United States, No. 82-472 (Nov. 1, 1983), slip op. 4, quoting *United States* v. *Turkette*, 452 U.S. 576, 580 (1981). "[O]nly the most extraordinary showing of contrary intentions * * * [by Congress] would justify a limitation on the 'plain meaning' of the statutory language." *Garcia* v. *United States*, No. 83-6061 (Dec. 10, 1984), slip op. 5.

In this case, the text of 21 U.S.C. 848 refutes petitioner's argument. By its terms, the CCE statute provides that "any" drug felony may serve as the predicate felony under Section 848(b)(1). See also 21 U.S.C. 802(13) (definition of "felony"). Likewise, the statute contains no limitation on the drug offenses that can constitute the series of violations under Section 848(b)(2). Hence, nothing in the broad language of the CCE statute lends any support to the claim that the conspiracy with which petitioner was charged could not be used as a predicate offense for the CCE count.

In addition, the provision that makes conspiracy a crime also proscribes attempts to commit drug offenses. See 21 U.S.C. 846. There is surely no basis to conclude, and petitioner does not contend, that attempt cannot serve as a CCE predicate. The fact that Congress treated attempt and conspiracy together in one statutory provision therefore also suggests that conspiracy can be a predicate offense. Cf. *Bifulco* v. *United States*, 447 U.S. 381, 399 (1980).

The plain language of the statute is reinforced by the legislative history of the CCE provision. For example, the principal congressional report on CCE parallels the statutory text, stating that "a person is engaged in a continuing criminal enterprise if (1) he violates any provision of title II or title III which is punishable as a felony, and (2) such violation is part of a continuing series of violations of title II or III * * *." H.R. Rep. 91-1444, 91st Cong., 2d Sess., Pt. 1, at 50 (1970); see also *id.* at 10. Petitioner has pointed to no indication in the legislative history that, contrary to the

language of the statute, Congress intended to establish any restriction on the use of a drug conspiracy as a predicate offense for CCE.

The purpose of the CCE statute also demonstrates that conspiracies can serve as CCE predicates. As the court of appeals explained (Pet. App. 33a), CCE is the so-called "kingpin" provision aimed at those who organize and run substantial drug trafficking operations — and petitioner would indeed appear to be the paradigm of the offenders Congress sought to reach with CCE. It is to be expected that many of these managers and supervisors will commit conspiracy offenses, and often such conspiracies are the only offense that these high-level participants personally commit. Yet there is not a single word, in either the statute or the legislative history, to suggest that Congress sought to limit the applicability of CCE in situations in which, as would frequently be the case, the defendant was involved in a drug conspiracy. On the contary, any such limitation would be a significant obstacle to the achievement of the central objective of the statute.

The essential flaw in petitioner's argument is readily illustrated. A drug operator who engages in two substantive crimes and a conspiracy has committed three offenses under the federal drug laws. We see no reason to assume that, even though the person has acted as a supervisor in concert with five or more other people and has obtained substantial income or resources, Congress intended to exclude him from the scope of the CCE statute because one of the violations was a conspiracy. Quite the opposite, Congress's manifest attitude of severity toward drug kingpins, and its " 'determination * * * to turn the screw of the criminal machinery * * * tighter and tighter' " (*Albernaz* v. *United States*, 450 U.S. 333, 343 (1981), quoting *Gore* v. *United States*, 357 U.S. 386, 390 (1958)), clearly contradict the assertion that Congress intended by silent implication to limit the use of conspiracies as a predicate for CCE.

Finally, consistently with the foregoing analysis, several courts of appeals have recognized that a conspiracy can serve as a CCE predicate. See *United States* v. *Brantley*, 733 F.2d 1429, 1436 n.14 (11th Cir. 1984); *United States* v. *Middleton*, 673 F.2d 31, 33 & n.2 (1st Cir. 1982); *United States* v. *Lurz*, 666 F.2d 69, 76-77 (4th Cir. 1981), certs. denied, 455 U.S. 1005, 457 U.S. 1136, and 459 U.S. 843 (1982).[2]

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[2]Contrary to petitioner's characterization (Pet. 8), *Lurz* supports rather than conflicts with our interpretation of Section 848. In *Lurz*, the court of appeals held that it would be a violation of double jeopardy to satisfy the felony element of CCE by using a conspiracy for which the defendant had previously been prosecuted and convicted. It was in this successive prosecution context that the court stated, in the passage quoted by petitioner, that "[o]ne may not first prove a conspiracy to distribute to establish a § 846 violation, and then move on to convict under § 848 as well, by using the very same conspiracy to distribute for the felony violation [in CCE]" (666 F.2d at 76). The court observed, however, that a previously prosecuted conspiracy could be used to meet the elements of CCE other than the principal felony, including the additional offenses necessary to constitute the continuing series of violations (*id.* at 76-77). In addition, in considering a separate conspiracy that had not been the subject of a prior prosecution, the court recognized that a drug conspiracy could satisfy the felony requirement of the CCE statute (*id.* at 76). Thus, nothing in *Lurz* interprets Section 848 to include a limitation on the use of conspiracy as a predicate offense.

As petitioner notes (Pet. 8), the court in *United States* v. *Jefferson*, 714 F.2d 689, 701 n.25, 702 n.27 (7th Cir. 1983), stated that a conspiracy under Section 846 cannot serve as a CCE predicate. But this passing statement was plainly dictum; it occurred in the course of a discussion of the propriety of cumulative sentences for CCE and substantive predicate offenses and, as the court itself commented, it was "irrelevant" to the decision in the case (714 F.2d at 701 n.25). Moreover, the court offered no analysis or explanation for its summary conclusion. In these circumstances, we do not think that *Jefferson* can be taken as the final and considered position of the Seventh Circuit on this issue or that it can be said to create a real and direct conflict that calls for this Court's review.

c. The arguments advanced by petitioner do not compel a different conclusion. Petitioner contends that conspiracy is a lesser-included offense of CCE and therefore cannot serve as a CCE predicate. In *Jeffers* v. *United States*, 432 U.S. 137 (1977), a plurality of the Court assumed arguendo that the "in concert" element of CCE requires proof of a conspiratorial agreement and hence that conspiracy is a lesser-included offense of CCE. See 432 U.S. at 149-150, 153 n.20.[3] But even accepting for present purposes that conspiracy is a lesser-included offense in the sense that successive prosecutions or multiple punishments would be improper, it does not follow that Section 848 should be read to exclude conspiracy from being a permissible predicate. The issue of predicate offenses relates to whether the CCE statute is applicable to a defendant at all; even if CCE and conspiracy charges cannot be brought in separate proceedings and are not subject to cumulative sentences, that does not mean, for the reasons discussed above, that Congress intended to exempt a drug trafficker from CCE simply because one of the offenses involved in his series of three violations was a conspiracy. Furthermore, the court of appeals agreed with petitioner that conspiracy is a lesser-included offense of CCE under *Jeffers* (Pet. App. 31a-32a), but it correctly concluded that conspiracy can nevertheless be a predicate offense as a matter of statutory interpretation. Accordingly, even accepting arguendo petitioner's view that a Section 846 conspiracy is a lesser-included offense of CCE, that does not support his quite different contention that such a conspiracy cannot serve as a CCE predicate.

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[3]In *Jeffers*, the conspiracy was not one of the predicate offenses for the CCE count. See 432 U.S. at 141, 142-143 (plurality opinion); *id.* at 158 (White, J., concurring in the judgment in part and dissenting in part).

In much the same vein, petitioner argues that to allow a conspiracy both to serve as one of the series of violations and to satisfy the "in concert" requirement under *Jeffers* would improperly "collapse" these elements together (Pet. 11).[4] Of course, where the Section 846 conspiracy involves five or more people in addition to the CCE defendant, there would be some overlap between the "series" and "in concert" elements, and the same evidence could be used to prove the conspiracy violation and the concerted agreement. But that hardly suggests that the CCE statute should be read, contrary to its language, history, and purpose, to exclude conspiracy offenses from the category of predicates. Under the court of appeals' holding, the "series" and "in concert" elements remain separate requirements under Section 848; that they may overlap in certain instances does not negate the congressional intent, as we previously demonstrated, to permit a conspiracy to be used as a predicate offense. See *United States* v. *Turkette*, 452 U.S. at 583, 587.

Finally, it is not necessary, as petitioner urges (Pet. 7-8, 10), for the Court to hold this petition pending decision in *Garrett* v. *United States*, No. 83-1842 (argued Jan. 16, 1985). *Garrett* presents the questions whether *successive prosecutions* for CCE and a *substantive* predicate offense violate the Double Jeopardy Clause, and whether cumulative sentences for those offenses are authorized by statute; no issue is raised concerning the relation between CCE and conspiracy or the propriety of using conspiracy as a CCE predicate. To be sure, the jury in *Garrett* was allowed to consider conspiracy offenses as predicates for the CCE charge, and it convicted Garrett on the conspiracy counts as

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[4]Notwithstanding petitioner's assertion (Pet. 7), the court of appeals' opinion makes clear that it did not misunderstand his argument in this regard. See, *e.g.*, Pet. App. 28a, 32a, 34a.

well as on the CCE count. Because Garrett had not contested that conspiracy violations could be predicate offenses, we argued, as one ground for affirmance, that the unchallenged counts sufficed to sustain his CCE conviction even if the Court agreed with his contention that double jeopardy bars successive prosecutions for CCE and substantive offenses that are necessary predicates for the CCE charge. But the clear premise for our submission was that, as the case came to this Court, the use of conspiracies as predicate offenses had not been attacked; in that posture, the Court will presumably dispose of the case on the assumption that, apart from the double jeopardy issue raised by Garrett, his CCE conviction is valid and undisputed. Given this procedural setting, the Court's resolution of *Garrett* will not control the question of statutory construction presented by petitioner here, and therefore consideration of this petition need not be deferred pending decision in *Garrett*.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

REX E. LEE
Solicitor General

STEPHEN S. TROTT
Assistant Attorney General

JOEL M. GERSHOWITZ
Attorney

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